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"We have since conducted ABS braking-in-a-curve tests.. .All these vehicles passed the performance requirements with a large margin of compliance. . . we project no additional benefits by requiring these performance tests.. ." 64 Fed. Reg. 71384 (1999).

The NTEA agrees that no additional safety benefits will be derived as a result of these proposed braking-in-a-curve performance test requirements. In addition, these proposed testing requirements do not meet the standard of practicability. As a result, the NTEA believes that this rulemaking should be terminated. The National Truck Equipment Association (NTEA) is the nation's only trade association representing distributors and manufacturers of multi-stage produced, work related trucks, truck bodies and equipment. The NTEA also represents various industry-related firms and organizations. The NTEA currently has over 1,600 member companies located throughout the nation. Most NTEA members are small businesses that sell on a local or regional basis.

The average NTEA member is a typical small business, a closely held corporation or independent proprietorship, run by community based management, operating a single facility and employing a small local work force. The average distributor member of the NTEA, the companies that sell and install truck bodies and related equipment (and generally are considered final stage manufacturers, intermediate stage manufacturers or alterers under NHTSA definitions), have been in business some 30 years, have about $5 million in annual sales and employ 20 people. The average NTEA manufacturer member, companies that fabricate and occasionally install truck bodies and related equipment, have been in business over 36 years, have $20 million in annual sales and employ approximately 300 people. Virtually all NTEA distributor and manufacturer members qualify as small businesses for purposes of the Regulatory Flexibility Act.

Vehicles produced by NTEA member companies for commercial or vocational use include, but are not limited to, fire trucks, ambulances, utility company vehicles, aerial bucket trucks, tow trucks, beverage delivery trucks, digger derricks, dump trucks and snow removal vehicles. The NTEA recognizes that all of the vehicles currently in production and equipped with ABS brakes already possess characteristics which would likely allow them to meet or exceed the brake testing requirements which NHTSA is proposing. The NTEA is concerned, however, that its members who produce vehicles in two or more stages will still not be able to demonstrate compliance with the standard in a significant number of situations. Manufacturers of multi-stage vehicles producing trucks for which it is not possible to pass through the incomplete vehicle manufacturer's certification will not have a practicable and objective means of demonstrating compliance with the standard.

We accept that NHTSA's testing of the brake-in-a-curve requirement may show that the test is repeatable and objective. Being objective does not necessarily make the testing requirement practicable.

By proposing this performance requirement NHTSA must assume it complies with the mandates in Paccar. Inc. v. NHTSA, 573 F. 2d 632 (9th Cir. 1978) cert. denied 439 U.S. 862 (1978). The NTEA disagrees. The proposed requirement does not provide for an objective and practicable method of demonstrating compliance with the standard for manufacturers of multi-stage vehicles.

By way of background, the Truck Equipment and Body Distributors Association (TEBDA, which was the predecessor organization to the NTEA) was a party to the PACCAR case. TEBDA complained of nothing in FMVSS 121, except the road test requirements for multi-stage manufacturers.

TEBDA argued that under the National Traffic and Motor Vehicle Safety Act (15 U. S.C. 13 8 1), it is the undisputed duty of the final stage manufacturer to certify each truck he produces as complying with every condition specified in FMVSS-121, including the fact that if the truck is run through the road test as specified, the truck will meet or exceed the required results. Failure of the truck to pass the test or failure of the certifier to use "due care" in ascertaining compliance before certifying, subjects the offender to severe civil penalties, including fines.

Because of the severity of the penalty, there is a compelling statutory requirement that any standard must be set forth in "objective terms," as the Sixth Circuit stated in Chrysler Core. v. Department of Transportation, 472 F.2d 659, 675 (CA6, 1972). In addition to the requirement for "objectivity," the Act, 15 U.S.C. 1392(a), requires that a standard must be "practicable."

TEBDA complained to the Ninth Circuit that under the circumstances of the final stage manufacturer, the road test requirement was not "practicable." NHTSA admitted that the road test was economically and physically impossible for the final stage manufacturer to conduct. NHTSA took the position that the final stage manufacturer did not have to road test each vehicle because some unspecified form of "sample" or "group" testing, mathematical calculations, or the like might be used in place of actually conducting the road tests to determine compliance -- with the proviso, of course, that the user of these alternatives

could be fined or penalized if, after using them NHTSA were to review them and find that they did not constitute a "due care" technique, or the truck u-hen tested did not pass the road test.

The problem, of course, as pointed out by TEBDA, was that my "sample" or "group" testing, mathematical calculations and the like, by definition are subjective and give no assurance, with objectivity, that each truck to which they are related actually meets the road test results after being built.

NHTSA specifically avoided stating in the regulation any alternative approach which the final stage manufacturer could use in place of the road test.

The Ninth Circuit held in TEBDA's case that the rule must be both practicable and objective:

> It is undisputed that it would be economically unfeasible for TEBDA members to road test each vehicle they complete. TEBDA argues, however, that its manufacturers run the risk of violating the "due care" provision of 15 U. S.C. § 1397(a)(1)(C) if they do not road test, since road testing is the only method NHTSA has specified whereby manufacturers can ensure that their vehicles are properly certified.
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> NHTSA asserts that road testing is not required of the manufacturers, and it is only necessary that any truck manufactured meet the test that it performs. According to the agency, due care could be satisfied by any number of alternative methods, such as group testing, mathematical calculations, and so forth. TEBDA contends that, since such alternatives are not contained in the regulations, its manufacturers have no assurance that these alternatives will ultimately be found to comply with the due care requirement.
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> In our opinion, the plain statutory mandate of "practicability" and "objectivity" is not met by agency "suggestions" of what might constitute compliance with the amorphous due care standard. Since NHTSA has admitted that road testing is beyond the practical and financial reach of the final stage manufacturers, it must propose some alternative method for those manufacturers which, if followed, it will recognize as fulfilling the due care requirement.

573 F. 2d 645, 1978.

In the October 1978 Federal Register notice NHTSA claims to have provided an alternative to road testing that would solve the problems of multi-stage manufacturers. In the preamble NHTSA states: "Fortunately an alternative to road testing does exist that would constitute "due care" in certification by any

final stage manufacturer that adopted it, whatever it's resources and engineering expertise. Parts 567 and 568 obligate the incomplete vehicle manufacturer to provide a basis for complete certification (the "incomplete vehicle document") with each vehicle, which can be used for certification as long as the final stage manufacturer does not violate an "envelope" of conditions listed in the document as the reasonable limits to which the incomplete vehicle manufacturer has already tested. A final stage manufacturer can avoid any road testing simply by a "pass through" of this incomplete vehicle document."

By NHTSA's own regulations, it is not possible to "pass through" certification for a vehicle completed from an incomplete chassis cab, whether or not one stays within the guidelines. Since no pass through is available for such chassis, staying within the limits provided by the incomplete vehicle manufacturer will not result in a properly certified vehicle. Even when a "pass through" is available, there are cases when the final stage manufacturer must exceed the incomplete vehicle manufacturer's guidelines. When this occurs, the final stage manufacturer must bear the full certification burden. NHTSA has even stated in the past with regard to the restrictions that create the incomplete vehicle document's envelope that "incomplete vehicle manufacturers have every incentive to make the envelope of completed vehicle specifications as narrow as possible and thereby place the burden of certification on final-stage manufacturers." 50 Fed. Reg. 13, 402, 13, 403 (1985). Thus, it is impossible to ignore the fact that a population of vehicles exists that has no alternative but road testing to demonstrate compliance under this proposal.

In this NPRM, NHTSA further addresses the issue of multi-stage vehicle certification and recognizes that there are situations in which a final stage manufacturer will not be able to pass-through the incomplete vehicle manufacturer's certification. In these cases, NHTSA states that "the manufacturer could use engineering analysis, actual testing, or computer simulations to certify their vehicle." 64 Fed.Reg 71383 (1999). The Agency also offered that trade association sponsored tests could be used.

The NTEA disagrees with the Agency that such suggestions would be acceptable under the current certification regulations.

When the final stage manufacturer bears the full certification burden (on any vehicle completed from an incomplete chassis cab or when the final stage manufacturer can complete a vehicle only by deviating from the incomplete vehicle manufacturer's guidelines) road testing is still the only method to demonstrate compliance that will ensure proper certification.

NHTSA's past suggestions of alternative actions that might constitute due care include group testing. First, as the courts have noted, any such suggestions are just that, merely suggestions. These suggestions are not written into the regulation and are thus not objective. Second, activities such as group testing are currently not practicable. NHTSA's approach to group testing fails to take into account the reality of the market place: The high degree of customization in the vocational truck market results in literally thousands of vehicle configurations. The cost to test these configurations in a manner which affords final stage manufacturers with valid certification data within the context of the current certification system, even if sponsored by the chassis manufacturers, would dwarf the expenditure incurred by those companies on

trucks produced in one stage.

The Courts reiterated the issue of practicability for multi-stage manufacturers in NTEA v. NHTSA 919 F. 2d 1148 (6th Cir. 1990). The NTEA brought suit against NHTSA over the extension of FMVSS 204 to a group of vehicles which included multi-stage produced vehicles. The NTEA argued that manufacturers of a substantial population of these vehicles could not demonstrate compliance with the standard based on the dynamic testing procedures specified in the regulation. The NTEA further argued that the "pass through" option was not available for a significant population of vehicles and no practicable options were specified in the regulation that would ensure multi-stage vehicle manufacturers that they could demonstrate compliance with the regulations.

The court held that:

> The pass-through regulations apply only to chassis-cabs, not to all incomplete vehicles, even though a chassis manufacturer must supply with all incomplete vehicles information dictating the limits of the chassis and under what conditions it will comply with the safety standards. When a final-stage manufacturer completes a vehicle on a cutaway chassis or stripped chassis, he or she must either ensure compliance or have some reason to believe that he or she is exercising due care with respect to the safety standards and is exempt under the due care provisions of 15 U.S.C. S 1397(a)(l)(C) and (b)(2) from the penalties for failure to certify a vehicle. (919 F. 2d 1152).
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> In order for a standard to meet the practicability requirement, it must offer the regulated party a chance to demonstrate compliance. The Ninth Circuit faced this precise issue when it reviewed air brake regulations for trucks in Paccar. That Court held the regulation proposed impracticable because it failed to provide adequate compliance provisions for manufacturers of complete trucks and for final-stage manufacturers. The standard had two problems in its compliance provisions with respect to final-stage manufacturers. First, the test was too expensive for the final-stage manufacturers to perform. Second, the standard itself provided no alternative to compliance other than testing. Although the Administration argued that alternative methods, such as mathematical models, would meet the "due care" provisions of the Act, the Ninth Circuit rejected these alternatives. The administration had to put the alternatives in the standard itself "Successive authorities of the [the Administration] might take an entirely different view than that announced by

> the incumbents, and subjecting the manufacturers to such a risk does not comport with due process requirements." Thus, for a standard to be practicable, it must offer, in the body of the standard itself, a means for all subjected to the standard to prove compliance.

919 F. 2d 1153.

The NTEA estimates that approximately 20% of all single unit trucks completed in multiple stages with work related equipment are built using incomplete chassis cabs such as stripped chassis, chassis cutaways or chassis cowls. Manufacturers of these vehicles can only adequately demonstrate compliance with this proposal through actual testing. Manufacturers of vehicles built on complete chassis cabs or who alter completed vehicles which must exceed the "envelope" of restrictions provided by the chassis manufacturer due to customer specifications will find themselves with no adequate method of demonstrating compliance other than actual testing. The NTEA cannot estimate a number for these vehicles as the restrictions from the chassis manufacturer are not created until after the rule is finalized and often not before the start of actual production. Further, once in production, these envelopes are subject to change with new model years. Nonetheless, NHTSA has previously admitted that the chassis manufacturers have every incentive, for limitation of liability purposes, to make the envelope restrictive, the NTEA agrees. As such, there will certainly be some population of vehicles that will exceed the envelope.

With actual testing as the only objective method available to demonstrate compliance, final stage manufacturers would be faced with trying to sell vehicles that cost significantly more than before this proposal, without offering any new benefit to the consumer.

Further, the NTEA disagrees with NHTSA's cost calculations. First, in its Rulemaking Analysis NHTSA estimates that between ten and twelve manufacturers would be involved in testing. Earlier in the NPRM, however, NHTSA recognized that some number of final stage manufacturers would be faced with the full burden of certification to this requirement. The NTEA estimates there are approximately 1,000 companies performing operations that would qualify them as final stage manufacturers or alterers. While it will be impossible for these companies to actually perform the required testing, this proposal would clearly call for it in those instances where the incomplete vehicle manufacturer's pass-through certification is not available.

Secondly, NHTSA certifies that this proposal would primarily affect manufacturers of medium and heavy vehicles, most if not all of which would not qualify as small businesses under the SBA. Presumably, NHTSA is referring to incomplete vehicle manufacturers. It is true that these companies are not likely to qualify as small businesses. However, this proposal will also affect final stage manufacturers and alterers who have the ultimate certification burden under NHTSA's certification regulations. Final stage manufacturers and alterers are almost all small businesses under the SBA definitions.

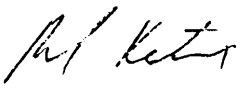
In conclusion, a final stage manufacturer can only be sure of compliance through actual testing but if all of the necessary vehicle configurations are road tested the manufacturer will not be able to sell the trucks due to the added cost.

The final stage manufacturer's other option is to not test, never be sure of compliance and incur unknown liability but be able to make a sale to the customer. This is not a viable position in which to force final stage manufacturers.

NHTSA still has not provided any objective and practical alternative to road testing for manufacturers of multi-stage produced, work-related trucks to demonstrate compliance with the proposed performance requirement. This proposal does not meet the court mandates in PACCAR v. NHTSA or NTEA v. NHTSA.

Given that this proposal clearly neither meets the court's mandates nor offers the consumer any benefits, the NTEA suggests that NHTSA terminate this rulemaking.

Sincerely,



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